Supreme Court, U.S.
FILED
JUN 4 1999
OFFICE OF THE CLERK

(3)

No. 98-1848

In The
SUPREME COURT OF THE UNITED STATES

COEUR D'ALENE TRIBE,
Petitioner,

v.

STATE OF MISSOURI EX REL.
JEREMIAH W. (JAY) NIXON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONSE TO MOTION TO GRANT, VACATE AND REMAND

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Petitioner Coeur d'Alene Tribe ("Tribe") has sought "emergency" relief in this action, ailegedly to protect its sovereign immunity from a vague threat posed by a July 27 hearing that the Tribe itself sought. But the hearing scheduled in the United States District Court for the Western District of Missouri does not jeopardize the Tribe's defense and does not warrant any relief from this Court. As discussed below, in a decision not affected by *Ruhrgas AG v. Marathon Oil Co.*, 1999 WL 303676 (U.S. May 17, 1999), the precedent on which the Tribe relies, this Court has affirmatively endorsed the procedure that the Tribe now wishes to stop. Moreover, the subject of the hearing is relevant not only to the issue of federal subject matter jurisdiction, but also to resolution of whether the Tribe can, in fact, assert sovereign immunity. And temporary relief in this case will be of no real value to the Tribe because the issues are to be heard simultaneously in two cases -- only one of which is the subject of the petition for writ of certiorari, yet in both of which the Tribe asserts it is the real party at interest.

This case arises from efforts by the State of Missouri to use Missouri courts and Missouri law to protect Missouri citizens from illegal gambling taking place in Missouri. The State maintains that the activity at issue -- gambling over the Internet -- takes place where the gambler sits and takes on risk, not where the computer "server" communicating with the gambler is located. Whether that is true is a critical element of various issues involved in this case -- including complete preemption, immunity, and personal jurisdiction. The petitioner removed the case to federal court; the State

moved to remand. Without making a finding as to whether the gambling at issue was taking place in Missouri (as opposed to Idaho, where the Tribe's lands are located), the district court held that respondent's claims were completely preempted by 25 U.S.C. §2701, *et seq.*, the Indian Gaming Regulatory Act ("IGRA"), and thus rendered moot the motion to remand the matter to state court.

The State appealed that decision to the U.S. Court of Appeals for the Eighth Circuit. That court ruled that the district court erred by denying remand without first deciding whether the gambling the Tribe sold over the Internet to Missouri residents on their computers in the State of Missouri was conducted "on Indian lands" within the meaning of IGRA, *e.g.*, 25 U.S.C. §2703(4). The appellate court remanded the action to the district court to determine if there is federal subject matter jurisdiction, *i.e.*, whether the Tribe leaves Indian land when it seeks and obtains bets from Missouri residents, located in Missouri, using computers in Missouri. The Eighth Circuit deferred the issue of tribal sovereign immunity to be decided by the state court if federal jurisdiction is found to be lacking.

The State, renewing its motion to remand to state court, asked the district court to expeditiously decide the "on Indian lands" issue, using the State's affidavit evidence already in the record, after allowing the Tribe to submit its affidavits. The Tribe deemed a written record to be insufficient, and demanded that the district court hold a hearing. The court set the hearing for July

27 and 28. The Tribe now argues that hearing has created such an "emergency" that this Court must vacate it.

The Tribe asserts that the district court cannot proceed to hear evidence and decide the issue of complete preemption and federal subject matter jurisdiction before it addresses the Tribe's allegation of immunity. This Court, however, has already decided to the contrary in a case extremely close to the one at hand, *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 842 (1989). In *Graham*, this Court found that there was no federal subject matter jurisdiction over claims by a state against an Indian tribe and that, consequently, the issue of the tribe's alleged sovereign immunity should not have been decided by the federal court. "As this case was improperly removed from the Oklahoma courts, the merits of the claims of tribal immunity were not properly before the federal courts . . . ." *Id.* This Court sent the case back to a state court that was competent to decide the immunity issue.

The Eighth Circuit followed the same course here. The Eighth Circuit held that the immunity issue should be addressed by the court with appropriate jurisdiction over the State's claims -- a state court, if federal jurisdiction was found lacking. That a state court may some day decide the immunity question does not create an "emergency" that threatens the Tribe's defense. The Tribe will not lose the opportunity to assert its defense if the district court decides that the gambling does not occur on Indian land and is not within the scope of IGRA; the alleged immunity will simply be addressed by a different, but proper, court.

Choosing to ignore *Graham*, the Tribe relies for its position on the recent decision in *Ruhrgas AG v. Marathon Oil Co.*, No. 98-470 (U.S. May 17, 1999). There, this Court held that a district court did not err in deciding a simple question of personal jurisdiction before it addressed a more complex issue of federal subject matter jurisdiction raised by a motion to remand. Contrary to the Tribe's assertion, this Court did not hold that a district court *must* decide any other issues before it addresses its own subject matter jurisdiction. This Court simply said that a lower court *could* decide uncomplicated issues of personal jurisdiction first. *Id.* slip op. at 13.

In so holding, this Court rejected the Fifth Circuit's rigid hierarchy for considering jurisdictional motions which always placed subject matter jurisdiction at the top. *Id.*, slip op. at 6-7. It is permissible, this Court said, in a removed case or otherwise, when the challenge to personal jurisdiction does not involve any complex issues of state law, for a district court to adjudicate that issue before a more complex one of subject matter jurisdiction. This Court relied, in part, on the fact that personal jurisdiction does not involve the merits of a case, in contrast to *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), in which this Court held that a federal court must always satisfy itself as to its subject matter jurisdiction before ruling on the merits. *Ruhrgas*, slip op. at 8-10.

The holding in *Graham* is not contradicted by the *Ruhrgas* holding, especially in light of the fact that a grant of immunity can be more in the line of a ruling on the merits than is a dismissal for lack of personal

jurisdiction. And as this Court noted in *Ruhrgas*, "Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter." *Ruhrgas*, slip op. at 2. Therefore, the Eighth Circuit acted properly and in keeping with this Court's dictates when it directed the district court in the present case to decide the issue of subject matter jurisdiction.

Moreover, the subject of the July hearing -- where the Tribe's Internet gambling occurs -- is important not just to the question of subject matter jurisdiction, but also to the alleged immunity defense. If the court finds that the gambling occurs on the Tribe's lands in Idaho, as the Tribe asserts, the Tribe will most likely be immune from the State's claims. But if the court finds that the gambling occurs in Missouri, and thus not on Indian lands, then the question of the Tribe's alleged immunity is an open and unresolved one.

The State disputes the Tribe's contention that this Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998), confers immunity from suit on the Tribe for the gambling it has offered and sold over the Internet to the citizens of Missouri in Missouri. The court held in *Kiowa* that a tribe is immune from suits on private commercial contracts whether those contracts are made on or off the reservation. But the Court did not hold that a tribe that leaves its own state, travels thousands of miles to a distant state where it has no lands, and there violates that state's laws is immune from actions by that state to enforce those laws. The facts that will determine whether the Coeur d'Alene Tribe fits into that category are precisely those to be addressed at the July hearing

that the Tribe itself sought. Though the evidence may be presented in the context of subject matter jurisdiction, the district court will be considering the same findings that would form the basis for a decision on the question of immunity. Delaying that hearing would, ironically, delay a federal court from deciding factual questions that the Tribe is asserting must be decided by a federal court.

Because the July hearing that the Tribe itself requested does not pose a threat to its ability to defend itself in whatever court is determined to have subject matter jurisdiction over this case, the State respectfully asks the Court to deny the Tribe's Motion to Grant, Vacate and Remand.

Respectfully Submitted,

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